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Reporting Child Abuse: When Moral Obligations Fail

Child abuse is not a new phenomenon,¹ yet the scope of child abuse generally was not perceived until Dr. C. Henry Kempe first coined the term "the battered child syndrome" in an article in the *Journal of the American Medical Association*.² The publicity resulting from Dr. Kempe's article led to legislation in all 50 states designed to identify and protect abused children.³ This legislation generally has taken three forms: 1) reporting statutes, 2) criminal statutes and 3) juvenile court or family court statutes which provide means for removing the child from the custody of abusive caretakers.

A primary goal of any effort to protect children necessarily must be to bring the abuse to the attention of the juvenile authorities to prevent future harm to the child.⁴ To promote this goal, every state in the union has adopted some form of legislation requiring specified professionals to report suspected cases of abuse.⁵ Although this is an important preventive measure, the narrow scope of many of these statutes leaves many children unprotected. Statutes invariably require physicians to report suspected abuse,⁶ but there is no guarantee that an abused child will be taken to the doctor. In some instances, parents, aware of their culpability and fearful of prosecution, have determined that medical treatment should not be sought.⁷

In addition to requiring reports of child abuse from medical practitioners, California statutes also require numerous occupational groups,

1. See generally, Radbill, *A History of Child Abuse and Infanticide* in the BATTERED CHILD 3,3-19 (R. Hefler & H. Kempe, ed., 2d ed., 1974); Parker & Adelman, *Child Abuse Reporting Laws—Some Legislative History*, 34 GEO. WASH. L. REV. 482, 482-90 (1966).

2. Kempe, Silverman, Steele, Droegemueller, & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17 (1962).

3. For a discussion and listing of these statutes see J. COSTA & G. NELSON, CHILD ABUSE AND NEGLECT: LEGISLATION, REPORTING AND PREVENTION, (1978); Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 6-30 (1967).

4. See, Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 389 (1974); Fraser, *A Glance At the Past, A Gaze At the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI-KENT L. REV. 641, 645, (1977-78).

5. Paulsen, *The Law and Abused Children*, in THE BATTERED CHILD, 153, 158 (R. Hefler & H. Kempe ed., 2d ed. 1974).

6. *Id.* at 161.

7. See *People v. Bullard*, 75 Cal. App. 3d 764, 768-69, 142 Cal. Rptr. 473, 476 (1977).

including teachers,⁸ licensed day care operators,⁹ film developers,¹⁰ and other persons¹¹ who come into regular contact with children in the scope of their employment to report suspected child abuse. Authorities point out, however, that the most serious injuries and the greatest number of deaths from the battered child syndrome are inflicted upon children under three years of age¹² who have little opportunity to maintain contact or visibility with others outside the home.¹³ Thus, for many children under school age, there is little chance that their peril will be discovered through occupational channels. Statistics on the actual occurrence of child battering vary depending on the source,¹⁴ but authorities agree that a great many cases are never detected.¹⁵

Even when detected, child abuse often is not reported. Failure to report child abuse occurs among those required to report by statute,¹⁶ as well as the general citizenry.¹⁷ A review of criminal prosecutions and literature on child battering provides disturbing examples of situations in which people knew of severe cases of physical abuse of small children and failed to intervene on behalf of the child.¹⁸ In one case of child battering, both a neighbor and the child's grandfather saw the child's injuries and offered to take the child to the hospital for treatment. When their offers were rejected by the child's mother, neither

8. CAL. PENAL CODE §§11165, 11166.

9. *Id.*

10. *Id.*

11. *Id.*

12. D. GIL, VIOLENCE AGAINST CHILDREN, 44 (1970); see also Appendix to the Journal of the Cal. Assem. Assembly Interim Committee on Criminal Procedure, Vol. 2., No. 8 Regular Session 69, 70 (1965). The report stated that one in four of all investigated cases involved death of the victim. Eighty percent of these children were under four years old and fifty percent were under two years old. *Id.* [Hereinafter cited as *Interim Committee Report*].

13. Fraser, *The Child and His Parents: A Delicate Balance of Rights*, CHILD ABUSE AND NEGLECT 315, 328 (R. Hefler & C. Kemple 1976).

14. Brown & Truitt, *Civil Liability in Child Abuse Cases*, 54 CHI-KENT L. REV. 753, 754 (1977-78). (500,000 instances in 1971); Fraser, *supra* note 4, at 644 (between 665,000 and 1,675,000 instances).

15. See, e.g., Bourne & Newberger, *Violence Toward Children in the United States* in CRITICAL PERSPECTIVES ON CHILD ABUSE, 53, 55 (Gelles ed., 1979) (citing numerous attempts to quantify the actual incidences and concluding that no one knows).

16. A 1960 report by the Massachusetts Society for the Prevention of Cruelty to Children reported that although doctors had seen 30% of all children reported that year, they had reported only 9%. Note, *supra* note 4, at 23-24. A later survey demonstrated that only 1.6% of all child abuse reports filed in the United States came from physicians. Brown & Truitt, *supra* note 14, at 761. Many reasons for underreporting by physicians have been identified by others and include disbelief that their patients were capable of intentionally harming their children as well as reticence to become involved in the legal system. *Id.* Another reason for underreporting is dislike of the punitive nature of the system for protecting children. Goodpastor & Angel, *Child Abuse and The Law: The California System*, 26 HASTINGS L.J. 1081, 1123 (1975); see also Kohlman, *Malpractice Liability for Failing to Report Child Abuse* 49 CAL. S.B.J. 118, 121 (1974).

17. Fraser argues that reporting statutes must focus on nonprofessionals to be truly effective. Fraser, *supra* note 4, at 646.

18. People v. Bullard, 75 Cal. App. 3d 765, 767, 142 Cal. Rptr. 473, 474 (1977). People v. Aeschilman, 28 Cal. App. 3d 460, 464-68, 104 Cal. Rptr. 689, 691-93 (1972) For an other example see FONTANA, SOMEWHERE A CHILD IS CRYING 139-40 (1973).

party took further steps to protect the child¹⁹ even though the neighbor, a former nurse, subsequently testified that the little girl's head was swollen two to three times its normal size, that the child's eyes were both blackened and swollen shut, and that a patch of hair was missing from her head.²⁰ The neighbor had also heard the events that culminated in the injuries,²¹ thus leaving little doubt that she must have known of the child's perilous situation.

Failure to act on behalf of the child is a precursor to further injury.²² In the absence of intervention, child battering typically escalates and more serious injuries are inflicted upon the child.²³ Furthermore, the perpetrator may believe that acquiescence by knowledgeable adults is a form of acceptance. Acquiescence may serve to reinforce the abuser's belief that the child deserves these beatings.²⁴ The child is thus in danger of future beatings.

Two major approaches utilized by governments and child protective organizations to overcome the failure to report abuse have been public awareness campaigns²⁵ and civil immunity for defamation when a report of child abuse is made in good faith.²⁶ Awareness and civil immunity are only a part of the solution, however, because even those who have recognized a case of child battering still may choose not to report or become involved.²⁷ Nonetheless, as a general rule,²⁸ no recognized legal duty is imposed upon the general citizenry to report child abuse or other crimes, nor has the law recognized a general duty grounded in tort to come to the aid of another.²⁹ The state, therefore, leaves protec-

19. *Bullard*, 75 Cal. App. 3d at 767, 142 Cal. Rptr. at 474.

20. *Id.*

21. *Id.*

22. *See Landeros v. Flood*, 17 Cal. 3d 399, 412, n. 9, 551 P. 2d 389, 395, 131 Cal. Rptr. 69, 75 (1976).

23. *Id.*

24. *See Aeschilman*, 28 Cal. App. 3d at 464-65, 104 Cal. Rptr. at 691-92.

25. These campaigns have culminated in observance of child abuse month, day and year. *See generally* Paulsen, Parker & Adelman, *supra* note 1, at 484.

26. *See* CAL. PENAL CODE §11172. *See generally* J. COSTA & G. NELSON *supra* note 3; Paulsen, *supra* note 3 (for an overview of statutes in other jurisdictions).

27. *See supra* notes 18-21 and accompanying text.

28. Vermont is the only state in the United States to have codified a general duty to rescue, providing criminal sanctions for failure to prevent harm where the risk to the rescuer is minimal. VT. STAT. ANN., tit. 12, §519 (1971); *see also*, Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 54 (1972-73). Criminal legislation requiring rescue whenever the risk to the potential rescuer is small has also been adopted in most of western Europe. *See generally*, Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817 (1961). In keeping with these statutes, the rescuer who does suffer a loss in fulfilling the statutory duty may be compensated by the rescuee under the Roman law theory of *negotiorum gestio*. *Id.* at 1108-26. Some of the problems which arise in this area were recently exemplified by an incident in a bar in which a woman was raped by several men while several other male patrons stood by and watched the assault. *See The Duties of a Bystander*, NEWSWEEK, March 28, 1983 at 79.

29. W. PROSSER, LAW OF TORTS, 340 (4th ed. 1980).

tion of small victims of parental abuse to the individual consciences³⁰ of the vast majority of potential reporters who may, and often do, choose silence. This comment proposes that in the case of abused children whose salvation may be entirely in the hands of others, the law should impose a legal duty to intervene on behalf of the child and provide abused children with a remedy when this duty is breached. If courts would allow the child to collect compensatory damages from anyone who fails to report child abuse, otherwise reluctant witnesses would be more likely to come forward and provide early detection which the child desperately needs.³¹

Imposing tort liability on nonreporters would not only compensate the child, but would provide the most efficient means of enforcing a general duty to report child abuse. While penal sanctions do provide deterrence, when deterrence fails, punishment requires the resources of law enforcement personnel and district attorneys whose priorities may preclude prosecution of nonreporters.³² In contrast, the child, as a direct beneficiary of compensatory damages, has an incentive to enforce the obligation to report.³³

This is not to say that difficulties would not be encountered in enforcing the obligation to report abuse. Problems do exist. An initial hurdle is putting potential rescuers on notice that they will be liable to the child if they fail to report child abuse.³⁴ Secondly, situations may be anticipated in which the potential rescuer fails to report, but subsequently decides that a report should be made. A report at this later date actually may expose the reporter to tort liability for failing to report when knowledge of the abuse first was acquired.³⁵ Third, distin-

30. *Id.* at 341. Prosser states that the "voice of conscience . . . [is] singularly ineffective either to prevent the harm or to compensate the victim." *Id.*

31. See Note *Implications of Research on Altruism*, 55 *IND. L. J.* 551, 552-61 (1980); Rudolph, *The Duty to Act: A Proposed Rule*, 44 *NEB. L. REV.* 499, 499 (1965).

32. See Brown & Truitt, *supra* note 16, at 761. There are no reported cases of criminal prosecutions for failing to report child abuse. *Id.*

33. For example, the defendant, Flood, in *Landeros v. Flood*, 17 Cal. 3d 399, 414-415, 551 P.2d 389, 396-97, 131 Cal. Rptr. 69, 76-77 (1976), was not criminally prosecuted.

The child, as an infant, will be dependent upon others to instigate and prosecute a civil suit. Means for providing the child with a personal advocate already exist. When a dependency hearing is held involving battered children. CAL. WELF. & INST. CODE §300(d). Welfare and Institutions Code section 318 requires the court to appoint counsel for the child. Subsection (d) of section 318 explicitly provides that counsel's duties include determining whether the child has a cause of action against anyone mandated to report suspected abuse under the reporting statute. (CAL. PENAL CODE §11172). If the child has been injured sufficiently to have a legitimate cause of action against a potential rescuer, in all probability a dependency hearing will be held. Alternatively, a suit might be instigated by foster parents or family members who are not themselves implicated in the abuse. Family members who are susceptible to liability for breaching the duty to report are no longer immune from liability in California. See *supra* notes 85-87 and accompanying text.

34. See Fraser, *supra* note 4, at 658.

35. See *Landeros*, 17 Cal. 3d at 406-07, 551 P.2d at 392, 131 Cal. Rptr. at 72 (damages were claimed for all subsequent injuries from the time the tortfeasor should have reported the abuse).

guishing legitimate punishment from abuse inevitably may lead to fine lines of distinction.³⁶

A comprehensive solution to these problems is beyond the scope of this comment. Some brief suggestions, however, will be made. First, information regarding the duty to report may be disseminated through the use of the media as case law develops.³⁷ While recognizing that all citizens are not well informed, some jurisdictions have imposed criminal liability upon all citizens for failing to report abuse.³⁸ Presumably the legislative bodies that impose this broad obligation have concluded that the costs of imposing liability upon the unwary are exceeded by the benefits of requiring reports to be made. As a second suggestion, to assure that civil liability does not prevent tardy reporting, immunity for previous recalcitrance could be triggered by a timely subsequent report.³⁹ Finally, determining whether the child's condition would have put reasonable persons on notice of abuse is a question properly left to the jury. The jurors, in considering all of the circumstances, are in the best position to determine when a reasonable person would have recognized allegedly abusive conduct that exceeds the scope of legitimate parental authority.⁴⁰

This comment will examine both common-law and statutory grounds for imposing tort liability to determine whether a cause of action can be sustained by the battered child against the nonreporter of abuse. Three possible theories for imposing a duty to rescue in child battering situations are explored. First, this comment will demonstrate that California courts in *special circumstances* have abrogated another general rule barring liability on the ground that no duty exists. Special circumstances imposing a duty of care may be found where the foreseeable risk of harm is great and the means of prevention are not overly burdensome.⁴¹ The second theory for imposing a duty to rescue the battered child requires finding that a *special relationship* exists between the potential reporter and either the child or the perpetrator of the abuse.⁴² Third, criminal sanctions for persons permitting child abuse to occur

36. Brown & Truitt, *supra* note 14, at 757-58.

37. See Fraser, *supra* note 4, at 658-59.

38. *Id.* at 658. (20 states require any person to report known abuse).

39. To the extent that liability is judicially recognized, affirmative defenses may also be judicially recognized or abrogated to further the policy of encouraging reports. See generally *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875-76 (1975).

40. See Fraser, *supra* note 4, at 659.

41. See, e.g., *Hergenrether v. East*, 61 Cal. 2d 440, 393 P. 2d 164, 39 Cal. Rptr. 4 (1964); *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955); *Enders v. Apcoa Inc.*, 55 Cal. App. 3d 897, 127 Cal. Rptr. 751 (1976).

42. In the absence of a special relationship there is no duty to protect another from the acts of a third person. See, e.g., *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203, 649 P.2d 897, 897, 185 Cal. Rptr. 252, 255 (1982); *Mann v. State of California*, 70 Cal. App. 3d 773, 779, 139 Cal. Rptr. 82, 86 (1973).

will be proposed as an alternative means of imposing a civil duty to prevent child battering. Under the presumption of negligence doctrine, the violation of a criminal statute also may lead to civil liability.⁴³

These three bases of liability are exceptions to the common-law rule denying liability for failing to aid another or failing to protect persons from the foreseeable acts of third parties. An examination of the historical background of the "no duty to rescue" rule reveals that the underlying rationales for denying liability are not applicable to situations involving child abuse.

I. COMMON-LAW PRINCIPLES OF DUTY

Under the common law, absent a special relationship, a person is not obligated to come to the aid of another.⁴⁴ This doctrine is rooted in the common-law distinction between action and inaction, or misfeasance and nonfeasance.⁴⁵ The principle distinguishing misfeasance from nonfeasance is that, while a person owes a duty not to cause harm to another by an affirmative act or omission, no similar duty exists to bestow a benefit upon an individual who is in peril when the peril has not been created by the potential rescuer.⁴⁶

Arguments postulated in support of the "no duty rule" are based upon the rugged individualism of the common law, which historically has regarded individuals as independent and self-reliant.⁴⁷ Courts and commentators also have expressed concern for the ramifications of imposing a duty to rescue in situations in which fifty potential rescuers stand by and fail to act.⁴⁸ Additionally, the desirability of using tort liability to force altruism upon individuals has been questioned.⁴⁹ Finally, opponents argue that a general duty to rescue should not be imposed because of the administrative difficulties inherent in determining what action would have been sufficient and similarly, whether protective action was feasible.⁵⁰

Taken together, these objections bear little relation to the realities of situations involving the battered child syndrome. Battered children clearly do not fit the common-law portrait of independent and self-

43. See *infra* notes 151-57 and accompanying text.

44. See *supra* note 42.

45. W. PROSSER, *supra* note 29, at 338.

46. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L. J. 247, 247 (1980).

47. McNiece and Thornton, *Affirmative Duties in Tort*, 58 YALE L. J. 1272, 1288 (1949).

48. Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, n. 5, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); McNiece & Thornton, *supra* note 47, at 1288.

49. W. PROSSER, *supra* note 29, at 338-43; see Weinrib, *supra* note 46 at 261. Weinrib distinguishes acts requiring "the heroism of sacrifice that characterize the morality of aspiration," from acts which evoke moral censure indicating that the rescue was "obligatory and not supererogatory". *Id.*

50. McNiece & Thornton, *supra* note 47, at 1289.

reliant individuals.⁵¹ Secondly, the typical scenario under which child battering takes place—repeatedly and behind closed doors⁵²—negates the problems that would arise in determining liability in emergencies when numerous potential rescuers stood by. Third, requiring the rescue of a battered child need not lead to an onerous burden forcing heroic behavior upon those of faint heart.⁵³ Rather, all that the law should require is a report to law enforcement or child protective agencies.

In circumstances in which the defendant alleges that reporting the battery would have resulted in a substantial risk of harm to the rescuer,⁵⁴ existing principles support allowing the reasonableness of the fear to be decided by the trier of fact.⁵⁵ The administrative difficulties encountered in the rescue situation are no greater than in other areas of tort law.⁵⁶ Under the accepted negligence standard, the question to be determined in delineating liability is whether the actor acted as a reasonable person would under like circumstances.⁵⁷ Similarly, the factual determination to be made when child abuse is not reported is whether, given the circumstances, a reasonable person would have notified the authorities that a child was in danger.⁵⁸ Moreover, any administrative difficulties become insignificant when weighed against the harm inflicted upon battered children and the public when child battering is not stopped.⁵⁹

51. *People v. Stritzinger*, 137 Cal. App. 3d 126, 130, 186 Cal. Rptr. 750, 752 (1982).

52. Schwartz & Hirsh, *Child Abuse and Neglect: A Survey of the Law*, Winter, MEDICAL TRIAL TECH QUARTERLY 272, 322 (1982); Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L. J. 257, 259 (1974); Comment, *Evidentiary Problems of Proof in Child Abuse Cases: Why Family and Juvenile Courts Fail*, 13 J. FAM. L. 819, 827-28 (1973-74).

53. See *supra* note 49 and accompanying text.

54. See McNiece & Thornton, *supra* note 47, at 1288; Weinrib, *supra* note 46, at 250. (Anticipated defenses might include allegations that reporting the battering would likely result in an assault upon the reporter.)

55. For instance, when a criminal defendant alleges self defense, the reasonableness of the degree of force used is a question for the trier of fact. See, e.g., W. LAFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 392-93 (1972).

56. Commentators and California courts have refuted the suggestion that administrative difficulties singularly can justify denying a remedy to an injured plaintiff. *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 403, 525 P.2d 669, 682, 115 Cal. Rptr. 765, 778 (1974); *Dillon v. Legg*, 68 Cal. 2d 723, 739, 441 P.2d 912, 917-18, 69 Cal. Rptr. 72, 77-78 (1968). Weinrib argues that: "Because legal language is very often 'open textured' the vagueness of a legal principle cannot be a sufficient ground for repudiating it, especially in a tort system that enshrines the concept of reasonableness as a fundamental notion." Weinrib, *supra* note 46, at 275; see also McNiece & Thornton, *supra* note 38, at 1289. Rudolph, *supra* note 31, at 512-36 (for a discussion attempting to resolve some of these problems).

57. *RESTATEMENT (SECOND) LAW OF TORTS* §314A comments e & f (1965).

58. See Weinrib, *supra* note 46, at 275.

59. See Kohlman, *supra* note 16, at 184. An estimated 20,000 children per year are battered. Of these, estimates are that one quarter will suffer permanent injury or death. *Id.* at 119.

II. THE CALIFORNIA APPROACH TO DUTY

A. Public Policy Factors

California courts, in keeping with their long recognized responsibility to update and re-examine common-law tort principles,⁶⁰ have overruled outmoded common-law rules in the past⁶¹ by weighing the interests of the plaintiff and defendant in conjunction with public policy factors. The policy factors to be considered in determining the existence of a duty have been stated in various ways.⁶² In an often quoted case, the requisite policy considerations were posited as:

- (1) The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; (2) the kind of person with whom the actor is dealing; (3) the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; (4) the relative ability of the parties to bear the financial burden of the injury and the availability of means by which the loss may be shifted or spread; (5) the body of statutes and judicial precedents which color the parties' relationship; (6) the prophylactic effect of a rule of liability.⁶³

The following discussion will demonstrate that these policy factors support finding a duty to rescue abused children.

The first factor to be addressed is the social utility of the conduct giving rise to the injury. Society pays dearly when abuses are inflicted upon children. Authorities on child abuse have found that previously abused children make up the bulk of violent criminals in society today⁶⁴ and that today's child abusers are yesterday's abused children.⁶⁵ Society has nothing to gain in adhering to the view that people should

60. *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 393-94, 525 P.2d 669, 678, 115 Cal. Rptr. 765, 772, (1974); *People v. Pierce*, 61 Cal. 2d 879, 882, 395 P.2d 893, 895, 40 Cal. Rptr. 845, 847 (1964).

61. *See, e.g., Rodriguez*, 12 Cal. 3d 382, 385, 525 P. 2d 669, 670, 815 Cal. Rptr. 765, 766 (1974); *Dillon v. Legg*, 68 Cal. 2d 722, 748, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968); *Rowland v. Christian*, 69 Cal. 2d 103, 109, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968).

62. *Compare Duarte v. City of San Jose*, 100 Cal. App. 3d 648, 658, 161 Cal. Rptr. 140, 145 (1980); *Bartell v. Palos Verdes Peninsula School District*, 83 Cal. App. 3d 499, 500, 147 Cal. Rptr. 898, 902 (1978), with *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 822, 131 Cal. Rptr. 854, 859-60, (1976), *Raymond v. Paradise School District*, 218 Cal. App. 2d 1, 31 Cal. Rptr. 847, 851 (1963).

63. *Raymond v. Paradise School District*, 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851-52 (1963).

64. The California Commission on Crime Control and Violence Prevention recently issued a report finding that child abuse is almost a precursor to violence and recommended that corporal punishment be banished in the home and in schools. *Sacramento Bee*, Apr. 13, 1983, at p. A3, col. 1. *See Bourne & Newberger, supra* note 9, at 33; CHILD ABUSE AND NEGLECT; THE FAMILY AND THE COMMUNITY 63 (R. Hefler, C. McKinney & C. Kempe ed. 1976); *see also*, Adler, *Child Abuse Victims: Are They Also Victims of an Adversarial and Hierarchical Court System?*, 5 PEPPERDINE L. REV. 717, 718 (1977-78).

65. Adler, *supra* note 55, at 718.

mind their own business when family matters are at issue.⁶⁶ Protection of the child and treatment for the family can only be implemented through reporting.⁶⁷

The second factor—the kind of person with whom the actor is dealing—provides compelling reasons for protecting abused children since the law has consistently required a greater degree of care from those who encounter children.⁶⁸ The earliest cases distinguishing the duties owed to children from the duties owed to adults involved the attractive nuisance doctrine.⁶⁹ The common law barred trespassers from suing landowners for injuries sustained because of dangerous conditions existing on the land. The attractive nuisance doctrine allowed courts to overcome common-law barriers to landowner liability for injuries suffered by child trespassers, while leaving intact the general no duty rule. California courts also have placed affirmative duties on street vendors to protect children from the foreseeable acts of others when a relationship previously was established⁷⁰ and when the purveyor has had no previous contact with the child.⁷¹ In both of these situations the courts took notice of the inability of children to protect themselves from dangers foreseeable to adults.

The abused child's helplessness can be put into better perspective by examining the general standard of care required of children. For example, the child's standard of care, unlike that of adults, is contingent upon the individual child's age and maturity.⁷² Children under four years of age rarely are capable of contributory negligence⁷³ and, like abused children, cannot be expected to protect themselves from danger. Legal principles which recognize the vast difference between the capabilities of adults and children to guard against unreasonable risks conform with requiring a duty to rescue abused children when the child's physical integrity is at stake.

Further support for requiring rescue of the abused child is found in the third factor—the workability of a rule of care. A simple measure like phoning a law enforcement or child protective agency is all that

66. See Paulsen, *supra* note 5, at 162. ("While generally we should not wish to encourage the 'snooping' neighbor . . . the possibility of ending a child's agony ought to allow an exception. . .").

67. Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI-KENT L. REV. 45, 64 (1973).

68. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts, 2788 (8th ed. 1974).

69. See *id.* at 2874.

70. Schwartz v. Helms Bakery Limited, 67 Cal. 2d 232, 236, 430 P.2d 68, 70, 60 Cal. Rptr. 510, 512 (1967).

71. Ellis v. Trower Frozen Products, Inc., 264 Cal. App. 499, 503, 70 Cal. Rptr. 487, 490 (1968).

72. B. WITKIN, *supra* note 68, at 2785.

73. *Id.*

should be required to fulfill the obligation to rescue abused children.⁷⁴ The rescuer in most instances incurs no risk, for the law provides anonymity and immunity to those who report child abuse in good faith.⁷⁵ Furthermore, the *relative* ability of the parties to prevent the injury clearly favors imposing a duty to act on the child's behalf. Child abuse victims are "virtual prisoners of their abusers."⁷⁶ These children can only hope for better days, as self-protection is unrealistic.

Fourth, the relative ability of the parties to bear the cost of the injury is also weighted in favor of the child. Children as a class do not have the ability to provide for themselves. In contrast, rescuers, as a class, have the potential ability to earn money and purchase homeowner's insurance covering general negligence liability.⁷⁷ Even if insurance is unavailable to distribute the costs,⁷⁸ the relative ability of the two classes to bear the burden of the costs of the injury is still weighted in favor of the child.

The fifth factor supporting the recognition of a duty includes the body of statutes and judicial precedents coloring the relationship of the parties. As previously noted,⁷⁹ the common law historically has required greater care when a person's conduct involves a risk of harm to children. California courts, in addressing other questions of duty, have stated that the duty concept actually may focus upon the rights of the injured plaintiff rather than upon the obligations of the defendant.⁸⁰ A demonstration, therefore, will be made that the child's interest in a safe environment is substantial and should take precedence over the interests of potential rescuers in remaining uninvolved.

The importance of a child's interest in physical integrity has been recognized by California courts in various circumstances. The California Supreme Court held in *In Re Angelia P.*⁸¹ that the interest of the state in promoting a safe environment for children is paramount to the fundamental right of parents to raise and enjoy custody of their chil-

74. See CAL. PENAL CODE §11166(f) (making investigation of child abuse reports obligatory).

75. *Id.* §11172.

76. See *supra* note 50.

77. The availability of insurance would appear to be of limited importance to the courts. See *Coulter v. Superior Court*, 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978). The court, having found several policy factors favoring the imposition of civil liability on social hosts, assumed that insurance would be made available, (emphasis added). *Id.*; see also *Pamela L. v. Farmer*, 112 Cal. App. 3d 206, 169 Cal. Rptr. 282 (1980). The court, in imposing liability on a social host for the acts of her husband, made no mention of insurance. *Id.*

78. See *supra* note 77.

79. See *supra* notes 69-72 and accompanying text.

80. *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 823-24, 131 Cal. Rptr. 854, 860 (1976). See *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968).

81. 28 Cal. 3d 914, 623 P.2d 198, 171 Cal. Rptr. 637 (1981).

dren.⁸² Angelia's parents challenged the standard of proof required to permanently sever the parent-child relationship, arguing that the standard should be "beyond a reasonable doubt" due to the parental interests involved.⁸³ The court, however, held that clear and convincing proof of unfitness was sufficient since the primary goal of adjudications that sever parental rights is to protect the interests of the child.⁸⁴ Additionally, in *Gillette v. Gillette*,⁸⁵ the landmark decision abrogating parental immunity for willful misconduct in disciplining children, the court held that children, like all other persons, have a right to freedom from physical injuries.⁸⁶ Like the "no duty to rescue rule," parental immunity was a common-law doctrine which served to deny the child a remedy for abuse.⁸⁷ By focusing once again on the child's interests in a life free from abuse, the courts can seize the opportunity to abrogate the "no duty to rescue rule."

Other legislative policies, set forth below, indicate that the child's interest in physical integrity is worthy of the highest protection. For example, in proceedings to terminate parental custody due to abuse or neglect, the child statutorily is provided separate counsel⁸⁸ whose duties include determining whether the child has a cause of action in tort for violation of the California mandatory reporting statute.⁸⁹ The legislature has also provided immunity for persons who are required to report abuse when unauthorized x-rays or pictures of the child are taken for the purpose of discovering or proving abuse.⁹⁰ In addition, the husband and wife evidentiary privilege has been abolished in dependency hearings. A supplemental rule, which prevents the use of any otherwise privileged testimony given in the dependency proceedings from being used in any other action, replaces the privileges recognized in other causes of action.⁹¹ Even more significantly, the strong prohibition against warrantless searches and arrests has been weakened to protect abused children, who may be removed from the home without a warrant by an investigator or detained by a medical facility when abuse is suspected.⁹² These policies demonstrate that the substantial interest

82. See *id.* at 916, 638 P.2d at 202, 171 Cal. Rptr. at 640.

83. *Id.* at 915, 628 P.2d at 201, 171 Cal. Rptr. at 640.

84. *Id.* at 919, 628 P.2d at 204, 171 Cal. Rptr. at 643.

85. 168 Cal. App. 2d 102, 335 P.2d 736 (1959).

86. *Id.* at 105, 335 P.2d at 737.

87. See Note, *Torts: Parental Liability to a Minor Child for Injuries Caused by Excessive Punishment*, 11 HASTINGS L.J. 335, 335 (1960).

88. CAL. WELF. & INST. CODE §318.

89. *Id.* §318 (d) (1980).

90. CAL. PENAL CODE §11171.

91. CAL. WELF. & INST. CODE §355.7.

92. *Id.* §305(a).

of children in a safe environment is deemed sufficient to take precedence over other competing values.

The final public policy factor to be considered is the prophylactic effect of imposing a duty to report child abuse. At issue is the need for early detection of child battering to protect those most vulnerable to physical abuse. By imposing an affirmative duty to report known instances of child battering, some individuals who might otherwise allow the abusive conduct to continue would come forward to protect themselves from damage awards, if not to protect the child.⁹³ The efficacy of imposing tort liability to overcome the problem of recalcitrant witnesses defies quantification. The ultimate goal of our legal system, however, is to affect conduct.⁹⁴ An assumption therefore can be made that like other rules of law, imposing a civil duty to report child abuse will increase the potential for early detection of abusive conduct.⁹⁵

This discussion has focused on the public policy factors that support imposing a duty to report child abuse. The remainder of this comment is devoted to exploring the theoretical framework by which the duty to report child abuse can be implemented. The first theory to be discussed requires an analogy to cases holding that "special circumstances" may lead to a duty where none would otherwise exist.

B. *Special Circumstances*

The California Supreme Court has recognized that "special circumstances" can give rise to a duty to protect others when no duty otherwise existed.⁹⁶ Specifically, the court has overruled the "no duty rule" in special circumstances involving "open vehicle"⁹⁷ cases. The first open vehicle case to come before the California Supreme Court was *Richards v. Stanley*.⁹⁸ In that case, the plaintiff alleged that the defendant was negligent because the defendant had left his keys in the ignition of his vehicle, thus enhancing the risk of theft and foreseeable injury. The court announced a "no duty rule" based on the premise that no duty was owed that required the vehicle owner to control the conduct of a third person.⁹⁹ In dicta, however, the court stated that the

93. See Note, *supra* note 31 at 557-58. Social Exchange theorists believe behavior is guided by maximizing profits and losses. By imposing legal liability and adding a pecuniary cost to the moral obligation to rescue, behavior can be changed. *Id.*; see also, Comment, *Stalking the Good Samaritan: Communism, Capitalism and the Duty to Rescue*, UTAH L. REV. 529, 543 (1976).

94. See Rudolph, *supra* note 31, at 499.

95. See *supra* note 31 and accompanying text.

96. See *supra* note 41.

97. *Dillon v. Legg*, 68 Cal. 2d 728, 742, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 81 (1968). (cases of unlocked cars with keys left in the ignition.)

98. 43 Cal. 2d 60, 271 P.2d 23 (1954).

99. *Id.* at 66, 271 P.2d at 27.

same acts might have been culpable and subject to redress if the car had been left where children were at risk.¹⁰⁰

Subsequently, the California courts, faced with difficult factual situations, have held that the "no duty rule" was not a bar to recovery when special circumstances imposed a greater potential of foreseeable risk or a lesser burden of preventive action. In *Richardson v. Ham*,¹⁰¹ the court found that special circumstances existed because the risks of harm from a bulldozer were inherently greater than those created by the defendant in *Richards v. Stanley*.¹⁰² The court found that bulldozers were attractive to children, that persons had been known to climb on them, and the means to avoid the risk of harm were readily available.¹⁰³ Similarly, in *Hergenrether v. East*,¹⁰⁴ the defendant left his keys in his partially loaded two ton truck overnight in a "very well established skid row."¹⁰⁵ Again, the court held that the foreseeability that the truck would be stolen and negligently driven was sufficient to warrant imposing liability.¹⁰⁶ The court in *Hergenrether* stated that each case must be considered in light of its own facts to determine whether *in toto* the facts justify a conclusion that the foreseeable risk of harm imposed is unreasonable.¹⁰⁷ Applying this same standard to the law involving a failure to rescue, the particular circumstances surrounding child abuse may be viewed as sufficiently egregious to require imposing a duty to prevent the foreseeable acts of the abuser. First, child battering is a recurring event¹⁰⁸ differing substantially from the typical rescue situation which requires quick reaction in the face of substantial danger to the potential rescuer.¹⁰⁹ Secondly, the situation meets the minimal burden factor¹¹⁰ because an easy method is available to rescue the child—a telephone call.

Although the "special circumstances" cases have been confined to open vehicle situations, the same rationale can be applied to other "no duty" situations without distorting the principles enunciated by the court. Moreover, the key-in-the-car special circumstances cases expanding the duty to protect others from the acts of third persons originated from dicta in *Richards*, which referred specifically to chil-

100. *Id.*

101. 44 Cal. 2d 772, 285 P.2d 269 (1955).

102. *Id.* at 776, 285 P.2d at 271.

103. *Id.*

104. 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

105. *Id.* at 443, 393 P.2d at 166, 39 Cal. Rptr. at 6.

106. *Id.* at 446, 393 P.2d at 167, 39 Cal. Rptr. at 7.

107. *Id.* at 445, 393 P.2d at 167, 39 Cal. Rptr. at 7.

108. See *supra* notes 18-22 and accompanying text.

109. See *supra* note 49 and accompanying text.

110. *Hergenrether*, 61 Cal. 2d at 444, 393 P.2d at 166, 39 Cal. Rptr. at 6; *Richardson v. Ham*, 44 Cal. 2d at 776, 285 P.2d at 270.

dren.¹¹¹ Accordingly, the common-law rule denying liability for non-feasance should not be adhered to when the foreseeable danger is that a child will continue to be battered by his custodians. Conceivably, by recognizing the special circumstances inherent in the child's situation, the court could evaluate the defendant's omission relative to other "no duty to rescue" scenarios¹¹² and reach the conclusion that the special circumstances inherent in the abused child's situation—the great risk of harm and the minimal preventive measures required—mandate imposing an affirmative duty to rescue the child upon anyone who has knowledge of the child's peril. Absent finding a general duty to rescue battered children based on the special circumstances inherent in the child's predicament, a duty may be imposed upon a smaller class of individuals under the special relationship doctrine.

C. *Special Relationships*

As has been the case in other jurisdictions, California courts have circumvented the full impact of the "no duty rule" by relying on an expanding list of *special relationships* which permit the imposition of affirmative duties.¹¹³ When a person stands in a special relationship to another, civil liability may be incurred for failing to prevent harm caused by the criminal, intentionally tortious, or negligent acts of a third person.¹¹⁴ A duty to act affirmatively may be found when a potential rescuer bears a special relationship to either the creator of the peril or the potential victim of the peril.¹¹⁵ Since the special relationship doctrine requires the existence of a relationship of some degree between the parties, some potential rescuers will fall outside the scope of this doctrine. For instance, strangers or neighbors who have not befriended the child or the perpetrator cannot be said to have a relationship with any of the parties, and thus would not be covered by the doctrine.

The earliest cases imposing a duty to aid another focused on innkeepers¹¹⁶ and carriers.¹¹⁷ Subsequent California cases, however, have applied the special relationship doctrine to the parent-child relation-

111. *Richards*, 43 Cal. 2d at 66, 271 P.2d at 27.

112. See *supra* note 107 and accompanying text.

113. See, e.g., *Tarasoff v. Regents of University of Calif.*, 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); *Buford v. State of Calif.*, 104 Cal. App. 3d 811, 823, 164 Cal. Rptr. 264, 271 (1980) RESTATEMENT (SECOND) LAW OF TORTS §315 at 122 (1965); Harper & Kline, *The Duty to Control the Conduct of Another*, 43 YALE L. J. 886, 886 (1934).

114. RESTATEMENT (SECOND) LAW OF TORTS §314A, comment d at 120 (1965).

115. *Id.*

116. W. PROSSER, *supra* note 29, at 34; Harper & Kline, *supra* note 113, at 901-02.

117. *Id.*; see also *supra* note 116.

ship,¹¹⁸ grandparent-child relationship,¹¹⁹ and the psychiatrist-patient relationship.¹²⁰

Carrying the doctrine even further, a recent Michigan decision utilized the special relationship doctrine to require rescue between friends on a social venture. The plaintiff's decedent in *Farwell v. Keaton*¹²¹ had been attacked by several other boys while on a social outing with the defendant. The defendant brought the friend home, but left him in his car in the driveway of his home without informing anyone of his friend's presence or need for medical attention.¹²² The defendant argued that he was under no obligation to render aid to his friend.¹²³ The court, disagreeing, held that the deceased and defendant, as companions on a social outing, had entered a special relationship.¹²⁴ Therefore, since the defendant could render aid without danger to himself, he had an affirmative duty to do so.¹²⁵

While no clear delineation of the factors constituting a special relationship exists,¹²⁶ because of the willingness of the courts to apply the special relationship doctrine to a variety of situations, the doctrine has been called an expanding concept.¹²⁷ Professor Prosser has predicted that courts will find a duty where reasonable men would recognize a duty to act and agree that a duty exists.¹²⁸ Both the Restatement (Second) of the Law of Torts and California courts have postulated that the law appears to be heading toward a duty to rescue in any relationship of dependence or mutual dependence.¹²⁹ Taken literally, if the law is heading toward the recognition of a duty to aid or protect in a relationship of dependence, a duty should be acknowledged that will obligate a person bearing even a slight relationship to an abused child to rescue

118. RESTATEMENT (SECOND) LAW OF TORTS §316 (1965); Harper & Kline, *supra* note 113 at 893-95.

119. *Poncher v. Brackett*, 246 Cal. App. 2d 769, 55 Cal. Rptr. 59 (1966). The court stated, "[T]he ability to control the child, rather than the relationship as such is the basis for a finding of liability." *Id.* at 772, 55 Cal. Rptr. at 61.

120. *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 436, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976).

121. 240 N.W. 2d 217 (Mich. 1976).

122. *Id.* at 220.

123. *Id.* at 219.

124. *Id.* at 220.

125. *Id.*

126. See Weinrib, *supra* note 46, at 247-48. But see McNiece & Thornton *supra* note 47, at 1289 (concluding that the common thread running throughout the special relationship cases is a previously existing economic relationship benefiting the obligor but maintaining this is insufficient grounds to limit application).

127. *J. A. Meyers & Co. v. Los Angeles County Probation Dept.*, 78 Cal. App. 3d 309, 315, 144 Cal. Rptr. 186, 189 (1978); *Mann v. State of California*, 70 Cal. App. 3d 773, 779, 139 Cal. Rptr. 82, 86 (1977).

128. W. PROSSER, *supra* note 29, at 327.

129. *Pamela L. v. Farmer*, 112 Cal. App. 3d 206, 210, 169 Cal. Rptr. 282, 285 (1980); *J. A. Meyers & Co.*, 78 Cal. App. 3d at 315, 144 Cal. Rptr. at 189; *Mann* 70 Cal. App. 3d at 780, 139 Cal. Rptr. at 86; RESTATEMENT (SECOND) LAW OF TORTS §315 comment b at 123 (1965).

the child from parental abuse. Friends of the family or child, and family members who have knowledge of the child's peril are likely to be the child's only means of salvation.¹³⁰ The battered child's dependence on others to prevent future harm is unquestionable.¹³¹ Existing principles support finding a special relationship between abused children and these adults.

In *Pamela L. v. Farmer*,¹³² the court of appeals held that a special relationship existed between a neighbor and children invited to the neighbor's home, imposing a duty upon the neighbor to protect the children from molestation by the neighbor's husband.¹³³ The court stated that the children were dependent upon the neighbor because they were children,¹³⁴ particularly vulnerable to this type of misconduct¹³⁵ and unable to protect themselves against a risk known to the defendant.¹³⁶ The court emphasized the fact that children of tender years were involved.¹³⁷

The circumstances focused upon by the *Farmer* court also prevail when the battered child syndrome occurs. The children are of tender years, particularly vulnerable and unable to protect themselves from a risk known to the potential rescuer. In *Farmer*, however, the court also found that the defendant voluntarily assumed the added duties imposed under the special relationship doctrine by inviting the children to her home.¹³⁸ Finding the requisite special relationship between the child and a possible rescuer therefore, will be easiest when a person has voluntarily assumed the care or custody of the child¹³⁹ and the decision in *Farmer* can be relied upon. Voluntary assumption of a special duty, however, does not appear to be a mandatory requirement before courts will impose liability for nonfeasance. Special knowledge coupled with an ongoing relationship may also provide grounds for imposing an obligation to rescue.

In *O'Hara v. Western Seven Trees*,¹⁴⁰ the appellate court imposed liability upon a landlord for failing to warn or take other precautions on behalf of his tenants to avert the possibility of another rape occur-

130. See *People v. Stritzinger*, 137 Cal. App. 3d 126, 130, 186 Cal. Rptr. 750, 752 (1982).

131. *Id.*

132. 112 Cal. App. 3d 206, 169 Cal. Rptr. 282 (1980).

133. *Id.* at 209-10, 169 Cal. Rptr. at 285.

134. *Id.* at 211, 169 Cal. Rptr. at 285.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See RESTATEMENT (SECOND) LAW OF TORTS §314A(4), at 118 (1965). (for example, a babysitter voluntarily assumes the duty of affirmative action by assuming the custodial responsibility.)

140. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

ring in the rented premises. The court held the landlord liable for failure to warn based upon his superior knowledge,¹⁴¹ as the defendant alone knew of past assaults and conditions making future assaults likely to occur.¹⁴² Although the alleged tortious act was clearly an omission, the court did not feel obligated to determine explicitly that a special relationship existed or that the affirmative duty to warn was based upon the landlord's control of the common area.¹⁴³ The court, instead, imposed liability because the landlord was in a position of superior knowledge¹⁴⁴ and failed to warn the tenant of the danger.

The leading case applying the special relationship doctrine when the relationship is between the potential rescuer and the perpetrator is *Tarasoff v. Regents of University of California*.¹⁴⁵ The *Tarasoff* court held that liability could be imposed upon a psychiatrist who failed to warn a known victim of his patient's intent to kill.¹⁴⁶ The court, finding a special relationship between the psychiatrist and patient, left open the question of whether foreseeability alone was enough to require a duty to warn.¹⁴⁷ The court, however, laid the groundwork for finding a duty to warn whenever a foreseeable risk to a known victim is established by recognizing that "our current crowded and computerized society compels the interdependence of its members."¹⁴⁸

Subsequent courts addressing the special relationship doctrine have interpreted *Tarasoff* as requiring knowledge of a known risk to a known individual.¹⁴⁹ For instance, in *Hooks v. Southern California Permanente Medical Group*,¹⁵⁰ the court stated that the duty to warn was predicated on the existence of a special relationship involving confidence and trust or special knowledge.¹⁵¹ Two years later, the California Supreme Court again addressed the duty to warn in *Davidson v. Westminster*.¹⁵² The plaintiff in *Davidson* alleged that police officers breached a duty to warn her of the possibility that she would be the next victim of an assailant known to the police to be operating in a laundromat under police surveillance.¹⁵³ The court first held that a

141. *Id.* at 803, 142 Cal. Rptr. at 490.

142. *Id.* at 804, 142 Cal. Rptr. at 490.

143. *Id.* at 803, 142 Cal. Rptr. at 490.

144. *Id.*

145. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

146. *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

147. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

148. *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

149. See *Buford v. State of California*, 104 Cal. App. 3d 811, 820-21, 164 Cal. Rptr. 264, 270 (1980); see also *Hooks v. Southern Cal. Permanente Medical Group*, 107 Cal. App. 3d 435, 444, 165 Cal. Rptr. 741, 746 (1980).

150. 107 Cal. App. 3d 435, 165 Cal. Rptr. at 746.

151. *Id.* at 444, 165 Cal. Rptr. at 746.

152. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

153. *Id.* at 201, 649 P.2d at 895, 185 Cal. Rptr. at 253.

special relationship could not be supported by the mere fact that the officers had visually identified the assailant from a distance.¹⁵⁴ The plaintiff also alleged, however, that the officers had a duty to warn based on their knowledge of the plaintiff's peril.¹⁵⁵ The court did not hold that a duty to warn could never be based solely on knowledge of peril. Rather, the court found that under the facts in *Davidson*, requiring police officers to warn all potential victims would paralyze the neighborhood.¹⁵⁶ *Davidson* is distinguishable from *Tarasoff* and *O'Hara* because of the absence of a known risk to a known victim. In contrast, when child abuse occurs, a known risk to a known victim from a known assailant does exist.

By analogy to the *O'Hara* case, the courts can require persons coming into contact with abused children to take affirmative action to protect the child. When the potential rescuer is an associate of the abuser, *Tarasoff* supports imposing civil liability. The potential rescuer, having been apprised of the situation, possesses the special ability to protect the child from further harm.¹⁵⁷ The child in essence becomes dependent on knowledgeable persons from the moment those persons comprehend the danger to the child and concomitantly realize that the child cannot protect himself. As the courts have admonished in other situations, the duties owed to a child are proportionate to the child's ability to avoid the perils he may encounter.¹⁵⁸

Finally, the relationship between both the abused children and the perpetrators of abuse and their friends and family is one of the clearest cases of dependency imaginable.¹⁵⁹ The infirmities of infancy mandate finding a special relationship between children and others. Courts may adhere to the no duty to rescue doctrine in other situations by distinguishing the degree of dependency that exists in the relationship itself and the child's peculiar inability to provide self-protection. When the relationship is very attenuated, the child can circumvent the special re-

154. *Id.* at 205, 649 P.2d at 898, 185 Cal. Rptr. at 256.

155. *Id.* at 208, 649 P.2d at 900, 185 Cal. Rptr. at 258.

156. *Id.* at 209, 649 P.2d at 900, 185 Cal. Rptr. at 258.

157. See *Draper Mortuary v. Superior Court*, 135 Cal. App. 3d 533, 537, 185 Cal. Rptr. 396, 398 (1982). The court stated:

The basis for analysis of whether or not there is a duty is the relationship of the parties. For if the conduct of the one who is to be charged with the duty brings him into a human relationship with another where social policy requires that either affirmative action or precaution be taken on his part to avoid harm, then a duty to act or to take the precaution should be imposed by law.

Id.; see Comment, *Liability for Criminal Violence*, 13 Loy. L.A. L. Rev. 535, 538 (1979-80) (for a discussion advocating limiting liability for the criminal acts of third parties based on relative control).

158. See *supra* notes 68-73 and accompanying text; *Wallace v. Der-Ohanian*, 199 Cal. App. 2d 141, 144, 18 Cal. Rptr. 892, 894 (1962).

159. See *People v. Stritzinger*, 137 Cal. App. 3d 126, 130, 186 Cal. Rptr. 750, 752 (1982).

lationship problem by alleging that the California Penal Code imposes an affirmative duty to prevent child abuse upon anyone who has knowledge of the abuse. The following discussion will demonstrate that Penal Code Section 273a prohibits anyone from permitting child abuse.

III. A STATUTORILY IMPOSED DUTY

California courts have used statutes to establish the acceptable standard of care or to create new duties when none existed at common law.¹⁶⁰ Violation of a statute intended to protect a class of persons of which the plaintiff is a member from the type of harm suffered gives rise to the "presumption of negligence" rule.¹⁶¹ California courts, employing this rule, also have relied upon criminal statutes which require affirmative acts to find a civil duty to act.¹⁶²

Criminal sanctions for child abuse always have been available within the realm of general assault and homicide statutes. In addition, California has adopted particularized statutes providing misdemeanor and felony penalties for child abuse.¹⁶³ The particular statute that this comment will analyze is Penal Code section 273a.¹⁶⁴ In pertinent part, sub-

160. See e.g. *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). The court overruled a long line of cases that had held that a seller of alcoholic beverages was not liable to persons subsequently injured by the acts of an intoxicated customer. *Id.* at 157, 486 P.2d at 153, 95 Cal. Rptr. at 623. In *Brooks v. E. J. Willis Truck Transportation Company*, 40 Cal. 2d 669, 255 P.2d 802 (1953), the Supreme Court found that the defendant was required by criminal legislation to stop and render aid to a pedestrian whom the defendant hit with his vehicle, regardless of whether the driver was at fault in causing the harm. *Id.* at 679, 255 P.2d at 808-09. Under common law, however, there was no duty to render aid unless a person's conduct was tortious in creating the harm. *Id.* See generally Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669*, 11 PAC. L. J. 907 (1980).

161. This presumption was codified in CAL. EVID. CODE §669 which provides:

(a) The failure of a person to exercise due care is presumed if:

- (1) He violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to a person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering the death or the injury to his person or property was a member of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

- (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
- (2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

162. See generally Holdych, *supra* note 160, at 920.

163. See CAL. PENAL CODE §§271, 272, 273a, 273d.

164. CAL. PENAL CODE §273a provides:

(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjust-

divisions (1) and (2) of Penal Code section 273a provide that *any person* who *willfully* causes or *permits* any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering¹⁶⁵ is guilty of a misdemeanor or felony.¹⁶⁶

Analysis of section 273a will be conducted in two stages. First, the scope of section 273a will be analyzed by looking at the language employed, past interpretations of similar language in similar contexts, and the arrangement of section 273a within the scheme of child protection statutes. The second issue to be addressed is whether interpreting section 273a as imposing an affirmative duty to act would be in conflict with the permissive language of the reporting statute which provides that persons not specifically mandated to report child abuse *may* report known or reasonably suspected cases of abuse.

A. Statutory Interpretation

Section 273a on its face¹⁶⁷ is written broadly enough to impose criminal liability not only upon the perpetrators of the abuse or those charged with specific responsibility for caring for the child, but also upon bystanders who knowingly permit the abuse to occur. Indeed, any limitation on the scope of conduct covered by section 273a is embodied in the code itself. In particular, the code limits liability to those who *willfully* permit child battering. The three terms, "any person," "willfully," and "permits," are the controlling words that will be analyzed in conformance with past judicial interpretations of similar provisions.

Section 273a uses the broad term *any person* in the first clause of the statute but in a subsequent clause, section 273a speaks specifically to persons having the "care or custody"¹⁶⁸ of a child. Both clauses penalize those who willfully cause or permit the child's person or health to be injured, while only the second clause penalizes those who place the child in a situation in which the child's person or health is endan-

tifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 3 or 4 years.

(2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

165. *Id.*

166. *Id.*

167. See *Coulter v. Superior Court*, 21 Cal. 3d 144, 150, 577 P.2d 669, 672, 145 Cal. Rptr. 534, 537 (1978).

168. CAL. PENAL CODE §273a.

gered.¹⁶⁹ The logical inference to be drawn from the use of these divergent terms is that the wording of the preceding section prohibiting *any person* from permitting child abuse was intended to reach persons living outside the home who bear no generalized responsibility regarding the care and custody of the child. Moreover, in two closely related cases, the courts have interpreted similar language and reached analogous conclusions.

In *Brocket v. Kitchen Boyd Motor Company*,¹⁷⁰ the appellate court held that the Business and Professions Code provision prohibiting "every person" from furnishing alcoholic beverages to minors was applicable to social hosts.¹⁷¹ Furthermore, the California Supreme Court in *Coulter v. Superior Court*¹⁷² held that the term "every person," in another section of the Business and Professions Code,¹⁷³ applied to both commercial and noncommercial suppliers of alcohol. The court specifically noted that other sections of the Business and Professions Code contained specific references to "licensees,"¹⁷⁴ and reasoned that if the legislature had intended to apply the statute to a narrow class of persons, the language of the statute would have reflected that intent.¹⁷⁵ Similarly, none of the other penal provisions dealing with child abuse imposes criminal liability upon persons who are not the direct perpetrators of the abuse.¹⁷⁶

Following the *Coulter* and *Brocket* decisions, the legislature disapproved *Coulter* and several other decisions imposing civil liability upon persons who furnished alcohol to others.¹⁷⁷ The legislature, however, did not disapprove of the court interpretations of those intended to be covered by the statute, nor did it expressly disapprove *Brocket*.¹⁷⁸ The failure of the legislature to mention *Brocket* can be understood by once again recognizing that traditionally the duties owed to children have exceeded those owed to adults.¹⁷⁹ *Brocket*, *Coulter*, and progeny, therefore, provide support for interpreting section 273a broadly. Since section 273a has been amended several times¹⁸⁰ with no changes having been made in the scope of the prohibited acts or omissions, a fair as-

169. *Id.*

170. 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1978).

171. *Id.* at 93, 100 Cal. Rptr. at 756; CAL. BUS. & PROF. CODE §25658.

172. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

173. CAL. BUS. & PROF. CODE §25602.

174. *Coulter*, 21 Cal. 3d at 150, 557 P.2d at 672, 145 Cal. Rptr. at 537.

175. Compare CAL. PENAL CODE §§271, 272, & 273d with *id.* §273a.

176. *Coulter*, 21 Cal. 3d at 150, 557 P.2d at 672, 145 Cal. Rptr. at 537.

177. CAL. CIV. CODE §1714.

178. *Id.*; see also Comment, *supra* note 157, at 539 (stating that not all of the "dram shop" cases are abrogated).

179. See *supra* notes 68-73 and accompanying text.

180. 1963 Cal. Stat. c. 783, §1, at 1811 (amending CAL. PENAL CODE §273a); 1965 Cal. Stat. c. 697, §1, at 2091 (amending CAL. PENAL CODE § 273a); 1976 Cal. Stat. c. 1139, §165, at 5108-09

sumption can be made that the legislature intended the statute to be broadly applied.

The next term to be addressed is the word "willfully." Willfully implies a purposefulness or willingness to commit or omit a certain act.¹⁸¹ In construing the term as used in the statute, the predominant view of the degree of negligence required to violate the statute is criminal negligence.¹⁸² This necessitates that the defendant's conduct amount to a reckless, gross, or culpable departure from the ordinary standard of care.¹⁸³ The defendant must act with reckless disregard for life,¹⁸⁴ and hence must have actual¹⁸⁵ or imputed¹⁸⁶ knowledge that the act or omission tends to endanger another's life. When child abuse is being perpetrated in a form which would put reasonable persons on notice that the child is being abused, little doubt can exist that the omission tends to endanger the child's life.¹⁸⁷ Once a person has acquired knowledge of child battering, any failure to prevent further battering is a willful omission.

Finally, section 273a extends criminal liability to persons who "permit" another to inflict unjustifiable physical pain or mental suffering upon a child. To permit an act does not require that one participate or encourage the act.¹⁸⁸ A person merely must knowingly allow the conduct to occur.¹⁸⁹ In interpreting analogous penal provisions, California courts have held that abstention from preventive action amounts to permission.¹⁹⁰ Absent a legally recognized privilege to act on behalf of

(amending CAL. PENAL CODE §273a); 1980 Cal. Stat. c. 1117, § 4, at 3590 (amending CAL. PENAL CODE §273a).

181. See *People v. Peabody*, 46 Cal. App. 3d 43, 46, 119 Cal. Rptr. 780, 781 (1975).

182. *People v. Penny*, 44 Cal. 2d 861, 879, 285 P.2d 926, 937 (1955); *People v. Rodriguez*, 186 Cal. App. 2d 433, 440, 8 Cal. Rptr. 863, 868 (1960).

183. *Peabody*, 46 Cal. App. 2d at 47, 119 Cal. Rptr. at 783.

184. *Id.* at 48-49, 119 Cal. Rptr. at 783; see also *People v. O'Brien*, 110 Cal. App. 3d Supp. 1, 4, 168 Cal. Rptr. 105, 107 (1980) (adhering to *Peabody*).

185. *Penny*, 44 Cal. 2d at 879, 285 P.2d at 937; *Peabody* 46 Cal. App. 3d at 47, 119 Cal. Rptr. at 782.

186. Imputed knowledge generally arises when (1) there is a duty to discover dangerous circumstances. See *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 569, 74 P. 149, 149-50 (1937). The employer will not be heard to say that he did not know of the dangers or (2) a relationship exists between two or more entities of such a nature that the law will presume the knowledge of one is the knowledge of the other. *Austin v. Hallmark*, 21 Cal. 2d 718, 729, 134 P.2d 777, 784 (1943). The application of imputed knowledge under section 273a, therefore, would seem to be limited to individuals who have a duty to discover reasonably foreseeable dangers confronting the child. Thus, imputing knowledge would only be appropriate when prosecuting or imposing liability on persons who have control or custody of the child within the confines of the second clause of section 273a. See CAL. PENAL CODE § 273a.

187. See *supra* notes 14 and 22.

188. See *supra* notes 81-82 and accompanying text.

189. *Ballasteros v. Alcoholic Bev. Etc. Appeals Bd.*, 234 Cal. App. 2d 694, 701, 44 Cal. Rptr. 633, 637 (1965); *Harris v. Alcoholic Bev. Con. Appeals Bd.*, 212 Cal. App. 2d 106, 123, 28 Cal. Rptr. 74, 84 (1963).

190. *Harris v. Alcoholic Bev. Con. Appeals Bd.*, 212 Cal. App. 2d 106, 123, 28 Cal. Rptr. 74, 83 (1963); see also *Markus v. Justices Court*, 117 Cal. App. 2d 391, 398, 255 P.2d 883, 887 (1953).

the child, however, permission is conceptually difficult to allege.¹⁹¹ A demonstration will be made showing that limited privileges to act for the benefit of battered and otherwise abused children are already legally provided.

Although no general privilege to interfere in the parent-child relationship exists¹⁹² when children are mistreated, the power of third persons to act on behalf of the child is statutorily recognized in at least three ways. Initially, when a parent or other person obligated to support the child refuses to provide the child with the necessities of life, a third person may in good faith provide the necessities and recover the costs from the obligor.¹⁹³ The necessities of life include medical care¹⁹⁴ and legal services.¹⁹⁵ Abused children are in dire need of medico-legal intervention. In the absence of intervention, the battery is not only likely to continue, but in all probability will escalate, causing more severe injuries as time goes on.¹⁹⁶ In addition to the privilege to provide needed care for the child and to recover the costs of care provided, any person has the power to initiate a dependency hearing to have a child removed from an unfit home.¹⁹⁷ Finally, statutes provide that anyone may report child abuse,¹⁹⁸ making an investigation into the allegations mandatory. The recognition of privileges allowing outsiders to intervene in family affairs supports the notion that a failure to take even the most remedial step in the child's behalf—a phone call to law enforcement or child protective authorities—is indeed permissive conduct.¹⁹⁹

The preceding interpretation of section 273a would allow subsequent application of the presumption of negligence rule to give the battered child a remedy for breach of the duty imposed.²⁰⁰ Undoubtedly, the presumption of negligence rule is viable today. Not only has the rule

191. See Dawson, *supra* note 28, at 817.

192. See Bourne & Newberger, *supra* note 15, at 54. (There is a delicate balance between the child's right to protection and parental right to autonomy.)

193. CAL. CIV. CODE §207.

194. *In re Ricky H.*, 2 Cal. 3d 513, 521, 468 P.2d 204, 208, 86 Cal. Rptr. 76, 80 (1970).

195. *Id.*

196. See *supra* note 16.

197. CAL. WELF. & INST. CODE §329. This is done by swearing out of an affidavit to the probation officer who must either start the proceedings or state in writing the reasons for failing to do so. If the probation officer fails to take action, the petitioner may apply for review by the juvenile court. *Id.* §331.

198. CAL. PENAL CODE §11165 (c).

199. See Comment, *Stalking the Good Samaritan: Communism, Capitalism and the Duty to Rescue*, 1976 UTAH L. REV. 529 (1976). The author states:

From a philosophical point of view, it does not appear possible to distinguish between the man who does something and the man who allows something to be done, when he can interfere.

Id. at 542. (Citing Tunc, *The Volunteer and the Good Samaritan* reprinted in, *THE GOOD SAMARITAN AND THE LAW*. (Ratcliff, ed. 1966)).

200. See *supra* note 160.

been codified by the legislature,²⁰¹ it also has been explicitly applied in the battered child sphere. In *Landeros v. Flood*,²⁰² the court held that a doctor's failure to report child abuse as mandated by California Penal Code section 11166²⁰³ would constitute negligence if the plaintiff could show that the doctor knew or should have known by reason of his diagnosis that the plaintiff was a victim of the battered child syndrome.²⁰⁴

Although no cases of criminal prosecution have been reported under Penal Code section 273a in which a person was not the perpetrator of the abuse or a person in the home chargeable with care or custody of the child, this does not preclude the conclusion that the legislature intended that persons violating the statute should be held responsible for their acts or omissions. To date, no cases of criminal prosecution of persons required to report child abuse under the reporting statute have been reported either. The legislature, however, approved the decision in *Landeros v. Flood*, allowing the imposition of liability upon physicians who fail to report child battering.²⁰⁵ Nothing intimates that the legislature would not also approve interpreting section 273a in the manner called for by the express language.²⁰⁶ Potential defendants, however, would likely argue that an extension of liability in this manner contradicts the reporting statute which provides that any person *may* report known or suspected abuse.²⁰⁷ The following discussion will demonstrate that this conclusion is neither necessary nor compelling.

B. Penal Code Sections 11166 and 273a: Conflicting or Complementary

Penal Code section 11166, the California reporting statute, requires mandatory reports of suspected child abuse by medical practitioners,²⁰⁸ child care custodians,²⁰⁹ nonmedical practitioners,²¹⁰ and child protective agencies.²¹¹ Specifically, the statute requires reports whenever any

201. CAL. EVID. CODE §669. For the full text see *supra* note 161.

202. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

203. See *supra* note 194 and accompanying text.

204. *Landeros*, 17 Cal. 3d at 410, 551 P. 2d at 394, 131 Cal. Rptr. at 74.

205. See 1980 Cal. Stat. c. 1071, §5 at 3425 (the legislative comments to the 1980 amendment to Penal Code section 11166).

206. See 65 OPS. CAL. ATTY. GEN. 335, 349-50 (1982) (the entire legislative scheme in the area of child abuse is aimed at discovering cases and preventing serious harm by prompt action); CAL. WELF. & INST. CODE §16506. This section provides protective services for children and states: "Nor shall this part . . . relieve persons . . . from the obligation *resting on all citizens* to report crimes. . . ." (emphasis added) *Id.*; see also 65 OPS. CAL. ATTY. GEN. at 350.

207. CAL. PENAL CODE §11166(c).

208. *Id.* at §11166(a).

209. *Id.*

210. *Id.*

211. *Id.*

of the delineated persons has knowledge of²¹² or reasonably suspects²¹³ that a child has been the victim of child abuse. Persons required to report, but who fail to do so, may be found guilty of a misdemeanor.²¹⁴

The reporting statute further provides that *any other person*²¹⁵ who has knowledge of or observes a child whom he or she reasonably suspects has been a victim of child abuse *may report*²¹⁶ the abuse. This provision was added to the statute in 1976.²¹⁷ According to the Assembly Committee in Criminal Justice, the legislature intended to encourage rather than discourage reporting of child abuse. The 1976 Amendment to section 11166 serves the purpose of assuring that a person not previously authorized²¹⁸ to report child abuse will not incur civil or criminal liability as a result of his report, unless the report was false and the reporter knew or should have known of the falsity.²¹⁹ The provision allowing any person to report was not specifically intended to place a limit upon the duty to report, but rather, to insulate persons who do report from liability to the alleged abuser for unintentionally making a false report.²²⁰ The permissive language of section 11166(c) can be explained by examining the substantive differences between the duties imposed by sections 11166(c) and 273a.

An argument can be made that the legislature purposefully chose not to hold the general citizenry criminally liable for failing to report child abuse under any circumstances. An equally plausible explanation, however, can be found in a brief history of the reporting statute. As originally adopted, the California reporting statute covered only physicians.²²¹ This limited response to what had been recognized as a widespread problem stemmed from a belief that physicians were in a unique position to discover child abuse and particularly the battered child syndrome.²²² As the list of persons required to report expanded,²²³ the

212. *Id.* at §11166(b).

213. *Id.*

214. *Id.* at §11172(b).

215. *Id.* at §11165(c).

216. *Id.*

217. 1976 Cal. Stat. c. 242 §2, at 461.

218. Assembly Committee on Criminal Justice, A. B. 2641, Robinson. (Copy on file at Pacific Law Journal).

219. *Id.*; see CAL. PENAL CODE §11172 (a).

220. See *supra* note 204 and accompanying text.

221. CAL. PENAL CODE §11161.5.

222. *Interim Committee Report*, *supra* note 12 at 71; Fraser, *supra* note 4 at 656.

223. See 1965 Cal. Stat. c. 1171, §2, at 2791 (amending/adding CAL. PENAL CODE §11161.5) (adding dentists and resident interns); 1966 Cal. Stat. 1st Ex. Sess., c. 31, §2, at 325, (amending/adding CAL. PENAL CODE §11161.5) (adding school superintendents and principals); 1971 Cal. Stat. c. 1729, §7, at 3680 (amending/adding CAL. PENAL CODE §11161.5) (adding teachers, licensed day care workers and social workers); 1972 Cal. Stat. c. 421 §1, at 746 (amending/adding CAL. PENAL CODE §11161.5) (adding summer day camp or child care center workers); 1973 Cal. Stat. c. 1151, §1, at 2380 (adding/amending CAL. PENAL CODE §11161.5) (adding Director of Welfare or Health Dept.); 1977 Cal. Stat. c. 958, §1, at 2908 (amending/adding CAL. PENAL CODE

legislature attempted to assure that persons on that list would have the professional skills necessary to assess suspected cases of abuse. Accordingly, the legislature mandated that these persons receive instruction on the means of detecting child abuse before being licensed by the state.²²⁴ The occupational categories subject to the mandates of section 11166 must report even suspected abuse and are presumed to be uniquely qualified to make informed judgments²²⁵ when suspected abuse is not blatant. These persons are held to a standard of care which exceeds that required of persons under section 273a. Liability under the reporting statute is imposed even when one "should have known" of²²⁶ the abuse. Section 273a, in contrast to the reporting statute, requires that the omission be willful. Therefore, to be held in violation of section 273a, a person must have knowledge or imputed knowledge that the child's life is in danger.²²⁷

Accordingly, no beneficial purpose would be served by holding that sections 273a and 11166 conflict. Rather, the two statutes are complementary in that the goal of both is the protection of abused children, albeit under different situations. Section 273a imposes an affirmative duty upon any person with knowledge of child abuse to prevent continued abuse. The presumption of negligence rule can then be applied to imply a civil duty to report child abuse. In this manner, the common-law adherence to the distinction between active negligence and omissions may be overcome.

Conclusion

As the law currently stands, the only inducement for most citizens to protect battered children from abusive caretakers is a moral one. As shown, however, leaving these decisions exclusively to the realm of personal conscience provides little protection to the youngest and most vulnerable members of society. Legal incentives are necessary to compel appropriate action on behalf of the child, and to afford the child a remedy when legal inducements fail. Once the no duty rule is re-ex-

§11161.5) (adding counselors, psychologists, peace officers and probation officers); 1982 Cal. Stat. c. 905, §2, at — (amending/adding CAL. PENAL CODE §11166) (adding photo developers).

224. See CAL. BUS. & PROF. CODE §§2089, 2091 (physicians and surgeons); CAL. EDUC. CODE §§448-477 (school nurses); CAL. HEALTH & SAFETY CODE §605 (public health nurses); CAL. EDUC. CODE §44691 (Dept. of Ed. to instruct school personnel); CAL. PENAL CODE §13517(a) (guidelines to police agencies to determine the need for protective custody).

225. See Ramsey & Lawler, *The Battered Child Syndrome*, 1 PEPPERDINE L. REV. 372, 381 (1974); Paulsen, *supra* note 3 at 3-4.

226. See *Landeros v. Flood*, 17 Cal. 3d 399, 409, 551 P.2d 389, 393, 131 Cal. Rptr. 69, 73 (1976).

227. See *supra* notes 172-76 and accompanying text.

amined, an advocate can readily demonstrate that public policy factors support the imposition of a duty on all persons to report child abuse.

Three potential theories for granting the child a remedy have been explored. First, an argument was made that the *special circumstances* inherent in the battered child's plight provide sufficient grounds for re-examining the "no duty to rescue rule." The gravity of the risk of harm to the child and the relatively simple means of guarding against that risk support the imposition of a duty of care. Additionally, tort law is riddled with exceptions to otherwise accepted standards of care when the risk of injury falls upon children. An alternative means for reaching a more limited class of potential rescuers may be possible through use of the *special relationship* exception. In conformance with a liberal reading of the special relationship exception, the possibility of holding friends or family members liable to the child for failure to rescue would be in keeping with the movement of the law toward finding a duty in relationships of dependence. To the extent that dependency is involved, few situations manifest a greater need for affirmative action by others. Third, an argument was made that Penal Code section 273a already imposes criminal liability upon any person who willfully permits child abuse. This comment also has established that the permissive language embodied in the reporting statute was not intended as an absolute limitation on the duty to report. Since no legislative policy stands in the way of imposing a civil duty to report, any violation of section 273a should implicate the presumption of negligence rule.

While commentators, lawyers, and scholars continue to question the desirability of the general rule denying liability for nonfeasance, this comment advocates imposing a duty to rescue abused children on those who have actual knowledge of the abuse. In the interests of justice, the helpless child should not be required to bear the onerous burden of abuse without redress for the cruel indifference of others. The common-law aversion to liability for nonfeasance may be rational in some instances, but when infants are endangered and brutalized by their guardians, the "no duty rule" escapes rationality and serves only to insulate conduct which is otherwise morally reprehensible.

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